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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

**ERICKSON PRODUCTIONS, INC.  
and JIM ERICKSON,**

*Plaintiffs,*

*v.*

**KRAIG R. KAST,**

*Defendant.*

Case No. 5:13-CV-05472-HRL

**DEFENDANT'S RESPONSE TO  
PLAINTIFFS' SUPPLEMENTAL  
BRIEF ON WILLFULNESS**

This memorandum responds to Plaintiffs' supplemental brief on willfulness (Docket No. 96).

None of the Ninth Circuit cases cited by Plaintiffs in their supplemental brief adopted or endorsed the Second Circuit's long-standing holding that willfulness is proven in that Circuit by showing that the defendant "should have known" its conduct was infringing. Not one. This Circuit has consistently held that a higher standard is required.

Similarly, none of the Ninth Circuit cases cited by Plaintiffs supports the argument that post-infringement conduct is relevant to determining statutory damages in this Circuit. The law has consistently been as described in Defendant's various memoranda on the issue. (Docket

Nos. 83, 95). Simply put: this Circuit has not adopted the multi-factor test adopted by the Second Circuit in *Fitzgerald*. The statutory damages inquiry is left to the sound discretion of the trier of fact. Neither the Supreme Court's decision in *Woolworth* nor the Ninth Circuit's decision in *LA News Service* has anything to do with the issue.

At bottom, this is a simple case with simple facts. As argued in Defendant's motion in limine (Docket No. 83), for multiple reasons the Plaintiffs should not be permitted to take the jury on a jaunt through Mr. Kast's response to the demand letter and the history of this litigation. The inquiry should end once Only Websites removed the photos from the draft website (which was done the day after Mr. Kast received the demand letter.) The facts that Mr. Kast contested the case and refused to pay damages to Plaintiffs is not relevant to determining statutory damages or willfulness in this Circuit (or, for that matter, in the Second Circuit.) (See Defendant's Supplemental Brief at 3:9-4:19)(Docket No. 95).

Respectfully submitted,

**LAW OFFICE OF PAUL W. REIDL**

By: 

Dated: February 26, 2015

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**CERTIFICATE OF SERVICE**

I, Paul W. Reidl hereby certify that on February 26, 2015, I served a true and correct copy of the foregoing

**DEFENDANT'S RESPONSE TO PLAINTIFFS'  
SUPPLEMENTAL BRIEF ON WILFULNESS**

on the following counsel of record by e-mail via the Court's CM/ECF filing system:

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